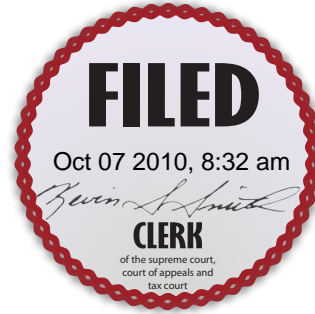


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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN PRITT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0909-CR-554

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-0808-FA-186810

October 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Steven Pritt (“Pritt”) appeals his convictions for three counts of Child Molesting, two counts as Class A felonies, and one count as a Class C felony.¹ We affirm the Class A felony convictions and reverse the Class C felony conviction.

Issues

Pritt presents three issues:

- I. Whether the trial court abused its discretion by excluding evidence that the victim’s mother had spoken to her about sexual activity and that some of the victim’s acquaintances indicated that they had been molested in the past;
- II. Whether the trial court abused its discretion by excluding evidence that a State’s witness had accused her ex-spouse of child molesting and the ex-spouse had subsequently been charged and acquitted; and
- III. Whether, with respect to the Child molesting by fondling or touching charge, the jury was erroneously instructed.

Facts and Procedural History

On August 17, 2009, Pritt was brought to trial on five charges related to his conduct against his daughter, A.P., then nine years old. The jury found Pritt guilty as charged, and the trial court entered judgments of conviction on three counts of Child Molesting: Count I (sexual intercourse), Count II (anal penetration), and Count III (fondling or touching). Pritt was sentenced to forty years imprisonment, with ten years suspended. He now appeals.

¹ Ind. Code § 35-42-4-3.

Discussion and Decision

I. Exclusion of Evidence of Coaching

A.P.'s trial testimony indicated that she was, despite being nine years old, knowledgeable of sexual matters. In relevant part, she testified:

Question: What did he [Pritt] touch your vagina with?

A.P.: His penis. . . .

Question: Where was your dad at?

A.P.: On top. . . .

Question: How was your dad, . . . what was he doing when he was near you?

A.P.: He was going up and down.

Question: He was going up and down?

A.P.: Yeah.

Question: What part of his body was touching the bed?

A.P.: I think his feet and hands. . . .

Question: How were you on the bed?

A.P.: My head was touching the bed, my shoulder was touching the bed, my back was touching the bed, my bottom was touching the bed, and my feet and my legs were touching the bed. . . .

Question: Now, you said your dad's penis touched your vagina, okay? I know this isn't fun but I need you to describe what you mean when you say that.

A.P.: Inside.

Question: Okay. How do you know it was inside?

A.P.: That's kind of hard to – because there's a little slit and he had his penis in it.

Question: Could you feel it inside you?

A.P.: Yes.

Question: How did it feel?

A.P.: Gross. . . .

Question: Do you remember when he took his penis out of your vagina?

A.P.: Yeah.

Question: How did that happen? What happened when he did that?

A.P.: He stopped and he got up.

Question: He stopped and got up? Were you saying anything to him before he stopped?

A.P.: No, beside that hurt.

Question: You told him it hurt? What did he do?

A.P.: He said that I could turn around and he'd put his penis in my bottom. . . .

Question: Did he do that?

A.P.: Yes. . . .

Question: When you say you flipped around, now what part of your body was on the bed?

A.P.: My top part and my hands, my stomach, vagina, and my legs and the front part of my feet.

Question: And what did your dad do – where was your dad at now?

A.P.: Then he got on top of me.

Question: He got on top of you? And what did he do when he got on top of you?

A.P.: He stuck his penis in my bottom.

(Tr. 56-60.) A.P. also testified that “see-through stuff sprayed out” when she and Pritt were “having sex,” and that it sprayed into and “on top” of her vagina. (Tr. 70.) She described Pritt’s penis: “It was fuzzy and it had a hole at the tip. ... Sometimes it was soft and sometimes it was hard.” (Tr. 71.)

The theory of Pritt’s defense was that A.P. was sexually precocious not because he had victimized her, but because of her having heard sexual activities described. Pritt also asserted that A.P. had accused him of intercourse (as opposed to fondling) only after she heard others claim to have been molested and she succumbed to the power of suggestion. Pritt sought to introduce evidence that A.P.’s mother had described sexual activity to her at a very early age. He also sought to introduce evidence that his former live-in girlfriend, Michelle Dupree, Dupree’s daughter S.P., and a family friend, K., had each told A.P. that a father or father figure had molested them. Pitt claims that the trial court’s exclusion of such testimony deprived him of the opportunity to present a meaningful defense.

Generally, a trial court’s ruling on the admission or exclusion of evidence is a matter within the sound discretion of the trial court, reviewable only for an abuse of discretion. Hape v. State, 903 N.E.2d 977, 991 (Ind. Ct. App. 2009), trans. denied. We will reverse only where the trial court’s decision is clearly against the logic and effect of the facts and circumstances. Id. “Error may not be predicated upon a ruling which admits or excludes

evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.” Ind. Evidence Rule 103.

As part of an offer to prove, Pritt elicited testimony from A.P. that, when A.P. was a toddler, her mother had explained sexual activity to her. S.P. and Dupree stated, also as part of an offer to prove, that each had shared with A.P. – without detailed description – that she too had been a child molestation victim. According to S.P. and Dupree, those revelations took place after A.P. had accused her father of molestation. The trial court determined that the Rape Shield Rule, Ind. Evid. Rule 412, required exclusion of such testimony from the jury.

Evidence Rule 412 governs the admissibility of past sexual conduct. Oatts v. State, 899 N.E.2d 714, 720 (Ind. Ct. App. 2009). The Rule reflects a policy embodied in Indiana’s Rape Shield Act, Indiana Code Section 35-37-4-4, that inquiry into a victim’s prior sexual activity should not be permitted to become a focus of the defense. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997). Rule 412 is intended to prevent a victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and to remove obstacles to reporting sex crimes. Id. Accordingly, in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or a witness may not be admitted, except:

- (1) evidence of the victim’s or of a witness’s past sexual conduct with the defendant;

- (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.

Evid. R. 412. As Pritt points out, he did not seek to introduce evidence that any past sexual conduct by the victim or a witness actually occurred; rather, he wanted to introduce evidence that conversations took place, i.e., verbal conduct. A.P.'s mother had provided some description of sexual activity and Dupree, K., and S.P. had assured A.P. that they empathized with her. As the excluded evidence did not involve establishing that sexual conduct occurred, it did not fall within one of the enumerated exceptions of the Rape Shield Rule. See State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (observing that accusations are verbal conduct and the Rape Shield Rule is designed to preclude evidence of prior sexual conduct).

Although the Rape Shield Rule did not require exclusion, this does not end our inquiry into the trial court's discretion to exclude evidence lacking in probative value. A defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of the State's witnesses. Kirk v. State, 797 N.E.2d 837, 840 (Ind. Ct. App. 2003), trans. denied. However, the right of confrontation is subject to the trial court's reasonable limitations in order to address concerns regarding harassment, prejudice, confusion, or interrogation upon issues of only marginal relevance. Id. Under Evidence Rule 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Pritt claims it was crucial to his defense to have the opportunity to reveal “the possibility of coaching and influence on A.P.’s testimony” and also that “there was another source for A.P.’s knowledge about sexual matters.” Appellants Brief at 30, 33. (emphasis added.) In essence, Pritt has made a bald assertion that A.P. was influenced to falsely accuse him because others revealed to her that they had likewise been victimized. However, Pritt’s offer of proof included no evidentiary facts to support his speculation. First, the timing is such that A.P. had already disclosed that Pritt had inappropriately “touched” her before the others revealed that they too had been molested. (Tr. 286.) Second, there is no evidence of coaching. The offer to prove record is devoid of evidence that Dupree, S.P., K., or anyone else encouraged A.P. in any manner to make more particularized allegations after she reported “touching.”

With regard to A.P.’s “knowledge of sexual matters,” she was able at nine years of age to describe sexual intercourse and criminal deviate conduct. She testified in great detail relative to her experience of pain, the positioning of her body, and Pritt’s ejaculation. However, there is scant indication that she learned anything of a sexual nature independent of the crimes perpetrated upon her. On offer to prove, A.P. stated, “[my mother] told me that sex – she just told me how sex is. She didn’t say anything.” (Tr. 294.) A.P. testified that she had been only one year old at the time. A.P. denied that she had discussed sex with Dupree or the other young women who had allegedly experienced molestation.

The proffered testimony, that A.P.'s mother had told her something about sexual activity when A.P. was a toddler, at best could be said to have marginal relevance. We do not find that the trial court abused its discretion by excluding it from the jury.

II. Exclusion of Prior Accusation Evidence

Pritt also claims that he should have been allowed to impeach Dupree with evidence that she had made "a prior false accusation of child molestation" against her ex-husband, Charles Dupree ("Charles"). Appellant's Brief at 39. Pritt had deposed Charles and tendered his deposition as an offer to prove.

Prior accusations are demonstrably false, and thus not protected by the Rape Shield Rule, when the victim in the instant matter has admitted the falsity of prior charges founded upon her accusation or the prior charges have been disproved. Candler v. State, 837 N.E.2d 1100, 1103 (Ind. Ct. App. 2005). Here, Charles' deposition testimony disclosed that he had been prosecuted upon an allegation of molesting S.P. and had been acquitted. Accordingly, the prior charge had been disproved. However, the offer of proof does not include testimony that the witness whose credibility Pritt sought to challenge, i.e., Dupree, made a false accusation. At most, the offer of proof consisting of the deposition asserts that the State brought a criminal charge involving Dupree's child upon which charge the State did not prevail; there is no testimony that the charge was brought at Dupree's behest or that she had personal knowledge of falsity. Without a showing that Dupree instigated a charge she knew to be false, the offer of proof testimony is not probative of Dupree's credibility. The trial court properly excluded it.

III. Jury Instruction on Fondling or Touching Count

Indiana Code Section 35-42-4-3(b), the basis of the fondling or touching charge against Pritt, requires the State to establish that the defendant has “with a child under fourteen ... perform[ed] or submit[ed] to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person[.]” With respect to that charge, the jury was given Final Instruction 25, as follows:

The intentional touching of a child’s genital area may justify an inference that the defendant acted with the intent to arouse or satisfy sexual desires.

(App. 103.) Pritt contends that the instruction violated his due process rights because it created an impermissible mandatory presumption, misled the jury by emphasizing particular evidence, and relieved the State of its burden of proof on the “intent” element of Child Molesting by fondling or touching.

“Instructing the jury lies within the sole discretion of the trial court, and considering the instructions as a whole and in reference to each other, we will not reverse for an abuse of that discretion unless the instructions as a whole mislead the jury as to the law in the case.” Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002). Pritt does not dispute that the trial court’s instruction accurately states the law: the intentional touching of the genital area can be circumstantial evidence of intent to arouse or satisfy sexual desires. Sanchez v. State, 675 N.E.2d 306, 311 (Ind. 1996). However, as Pritt points out, the instructional language recites an appellate standard of review where sufficiency of the evidence has been challenged, and is

not necessarily proper for use as a jury instruction. That said, there is no blanket prohibition against the use of appellate decision language in jury instructions. Gravens v. State, 836 N.E.2d 490, 494 (Ind. Ct. App. 2005), trans. denied.

The Due Process Clause of the United States Constitution protects an accused against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” B.K.C. v. State, 781 N.E.2d 1157, 1163 (Ind. Ct. App. 2003) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Accordingly, the State must establish beyond a reasonable doubt all elements of the offense charged. Staton v. State, 853 N.E.2d 470, 473 (Ind. 2006). “A jury instruction will be found to violate the Fourteenth Amendment where it is reasonably likely that the jury interpreted the instruction as shifting to the defendant a burden of persuasion on the intent element.” Winegeart v. State, 665 N.E.2d 893, 903 (Ind. 1996).

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts, while a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves those predicate facts. Higgins v. State, 783 N.E.2d 1180, 1185 (Ind. Ct. App. 2003), trans. denied. Final Instruction 25 utilizes the permissive term “may” and permits, but does not require, the jury to infer intent to gratify sexual desires from intentional touching of the genital area. See Winegeart, 665 N.E.2d at 904 (observing that “may look to,” “may infer,” and “may consider” describe permissive inferences). In light of the permissive language employed, Final Instruction 25 is not a mandatory instruction.

Pritt further argues that, even if the instruction does not invade the province of the jury by creating a mandatory presumption, it unduly focuses attention upon one element. He maintains that the emphasis on particular evidence is erroneous according to Ham v. State, 826 N.E.2d 640 (Ind. 2005), Ludy v. State, 784 N.E.2d 459 (Ind. 2003), Dill v. State, 741 N.E.2d 1230 (Ind. 2001), and Marks v. State, 864 N.E.2d 408 (Ind. Ct. App. 2007), habeas corpus denied, 2009 WL 2170441 (N.D. Ind. 2009). Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. Ham, 826 N.E.2d at 641-42.

In Dill, the Court held that it was error to instruct the jury that a defendant's flight after the commission of a crime, although not proof of guilt, may be considered as evidence of consciousness of guilt. 741 N.E.2d at 1232. The Court found "no reasonable grounds to justify focusing the jury's attention on the evidence of flight" and further found that the challenged instruction had "significant potential to mislead." Id.

In Ludy, the Court held that the trial court erred in instructing the jury that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." 784 N.E.2d at 460. The instruction was problematic for at least three reasons: first, it unfairly focused the jury's attention on and highlighted a single witness's testimony; second, it presented a concept used in appellate review that is irrelevant to a jury's function as fact-finder; and third, by using the technical term "uncorroborated," the instruction could mislead or confuse the jury. Id. at 461.

In Ham, our Supreme Court held that the trial court erred in instructing the jury that: “A defendant’s refusal to submit to a chemical test may be considered as evidence of intoxication.” 826 N.E.2d at 641. The instruction was found misleading by “unnecessarily emphasizing a specific piece of evidence.” Id. More recently, in Marks, a panel of this Court found error in the giving of an instruction on impairment that provided: “Evidence of the following can establish impairment: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcoholic beverage on the breath; (5) unsteady balance; (6) failure of field sobriety tests; (7) slurred speech[.]” 864 N.E.2d at 410. The Marks Court concluded that “the instruction in this case suffers from the same infirmities as those in Dill, Ludy, and Ham.” Id. at 411. We likewise find that the instruction herein suffers from the same infirmities as those in Dill, Ludy, and Ham, as a specific portion of evidence was unduly emphasized.

Moreover, the challenged instruction permits the jury to infer the intent element from the existence of the conduct element. Such an instruction operates to relieve the State from proving the requisite statutory intent element. See McDowell v. State, 885 N.E.2d 1260, 1263 (Ind. 2008) (instruction directing jury that it could find the intent element of Voluntary Manslaughter from evidence that the mortal wound resulted from the defendant’s use of a deadly weapon upon an unarmed person relieved the State from proving the intent element). Because the State was relieved of its burden of proof upon an element of the charged offense

and therefore Pritt was not afforded due process, we reverse Pritt's conviction for Child Molesting as a Class C felony.²

Conclusion

The evidentiary rulings of the trial court did not deny Pritt a fair trial. However, the jury was improperly instructed with regard to the fondling or touching count, and we reverse that conviction. Pritt may nonetheless be re-tried on that count.

Affirmed in part and reversed in part.

MAY, J., and BARNES, J., concur.

² In McDowell, our Indiana Supreme Court observed that reversal for such instructional error did not preclude the State from retrying the defendant. 885 N.E.2d at 1264. Here, we have determined that there was sufficient evidence to support the Class C felony conviction, such that retrial is not barred on double jeopardy principles. In addition to describing events of sexual intercourse and anal intercourse (supporting Pritt's convictions upon Counts I and II), A.P. testified that Pritt had touched her vagina with his mouth. There is sufficient evidence from which the jury could have inferred that Pritt touched A.P. "with intent to arouse or gratify sexual desires." Ind. Code § 35-42-4-3(b).